81202-1





No. 81202-1

**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

GERALD KINGEN and JANE DOE KINGEN, husband and wife, and the marital community comprised thereof; SCOTT SWITZER and JANE DOE SWITZER, husband and wife, and the marital community comprised thereof,

Defendants/Appellants,

v.

EUFEMIA "EMMA" MORGAN, NANCY PITCHFORD, and DANIEL MCGILLIVRAY, individually and on behalf of all members of the class of persons similarly situated,

Plaintiffs/Respondents.

# PLAINTIFFS' ANSWER TO SEVEN STATEWIDE BUSINESS GROUPS' AMICI CURIAE MEMORANDUM

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## I. SUMMARY

The Seven Statewide Business Groups ("Amici"), like Defendants Kingen and Switzer, ask this Court to accept review for the purpose of overruling its earlier decision in *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998). Review is not warranted because, first, the Amici cite no decision of this Court with which the Court of Appeals decision (*Morgan v. Kingen*, 141 Wn. App. 143, 169 P.3d 487 (2007)) conflicts. *Morgan* relied on *Schilling*, which held that a director or officer is personally liable for willfully withholding an employee's wages under RCW § § 49.52.050, 070.[1] *See* Amici Memorandum at 6. The Court of Appeals simply followed *Schilling* in acknowledging the legislature's manifest intent to ensure the payment of wages due employees. There is no conflict with a decision of this Court.

Second, the Amici offer no issue of public interest that this Court need determine. The legislature's intent to hold agents and officers liable for willfully withholding wages is manifest in the wage statutes. Furthermore, no court has recognized the "inability to pay" as a complete defense, especially where, as here, the defendants chose to continue to

[1] As Plaintiffs explained in their Objection to the Amici's Motion for Leave to File an Amicus Brief, the Issue of Concern to Amicus Curiae set forth in the amicus brief misstates the issue for review. The Amici are concerned that an "employer" may be found liable under RCW 49.52.050-070, which may include corporate entities that provide a liability shield for individual officers and directors. Plaintiffs, however, did not sue their "employer," Funster's Casino. Plaintiffs sued Kingen and Switzer individually as officers running the business and directing and controlling the payment of wages.

operate when they were unable to pay their employees. Washington law is well settled on the liability of employers who choose not to pay their employees.

The Amici and Defendants ask this Court to change Washington's longstanding policy that strongly favors payment of employee wages. The Amici, like Defendants, propose that hourly wage earners assume the risk of working for nothing without the benefit of exponential profits for taking that risk. The Amici and Defendants propose that those who stand to profit most from the choice to take a business risk should be protected at the expense of hourly wage earners. That directly contradicts the purpose of RCW 49.52.070 to protect employees when the individuals responsible for paying the employees decide not to pay their wages.

In this case, Defendants Kingen and Switzer risked their business, Funster's Casino, on an unsuccessful attempt to convince the legislature to allow slot machines for non-tribal casinos. Still, they continued to operate while in Chapter 11, until they were finally ordered into Chapter 7 bankruptcy. The "inability to pay" alleged by Defendants was, however, not the result of the company being ordered into Chapter 7 bankruptcy.[2] As in *Schilling*, the Defendants gambled with their employee's wages when they decided to file for Chapter 11 and continue operating despite

[2] Notably, the Defendants even refused the Chapter 7 bankruptcy trustee's request to pay employee wages. *See* Answer to Petition at 9.

the fact that the business was no longer able to pay its employees. Washington law has long penalized vice-principals, agents, and officers for exactly such willful failure to pay employee wages.

## II. ARGUMENT

The Amici seek review under RAP 13.4(b)(1) and (4), which provide that this Court will accept review "only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court," or "(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." *See* Amici Memorandum at 1; RAP 13.4(b)(1), (4) (emphasis added). The Amici's argument for accepting review under RAP 13.4(b)(1) fails because they do not cite any case with which the Court of Appeals decision conflicts. The Amici merely contend that the Court of Appeals erred by applying *Schilling*. Amici Memorandum at 6. But the Amici concede that the Court of Appeals followed *Schilling*, the Supreme Court authority on point. Therefore, they can point to no conflict between the Court of Appeals decision and *Schilling,*[3] and review is therefore not appropriate under RAP 13.4(b)(1).

[3] The Amici go so far as to turn stare decisis and the rule of law on its head by suggesting that because the members of the Court have changed, so should the law. *See* Amici Memorandum at 7 fn.1. More to the point, the fact that the Amici ask the Court to reverse the Court of Appeals and at the same time overrule *Schilling* shows that the Court of Appeals decision is not in conflict with *Schilling* and, thus, not appropriate for review.

The Amici's argument for review under RAP 13.4(b)(4) mistakenly frames the issue as whether Chapter 7 bankruptcy should protect agents and officers from liability. The Court of Appeals did not ignore the significance of Chapter 7 bankruptcy protections. The Court of Appeals simply refused to allow Defendants to escape liability when they chose to pay creditors, who assume a risk when loaning money, rather than their employees, who had already earned the money Defendants refused to pay.

> Here, Kingen and Switzer, both of whom were officers of Funsters, continued to operate the company before and after bankruptcy proceedings. They did so despite its financial difficulties. They made decisions about payroll, controlling payments to employees and other creditors based on their decisions about which Funsters' competing creditors would be paid. They permitted unpaid wages for two pay periods to accrue to over $179,000 as of early April 2003. Their hope that business would improve due to legislative enactments concerning gambling never materialized. The bankruptcy court ultimately converted the chapter 11 debtor-in-possession proceeding to a chapter 7 liquidation in light of the financial realities of the situation. This record fully supports the grant of summary judgment on the basis that nonpayment of wages was willful.

*Morgan*, 141 Wn. App. at 155-56. Given Washington's strong policy in favor of paying employees the wages they earned, the Court of Appeals refused to allow Defendants to gamble away money that belonged to their employees, and then seek refuge after the fact behind the bankruptcy laws.

The Amici mischaracterize Defendants' inability to pay as a wholly "legal" inability to pay. As the Court of Appeals pointed out, Defendants' Chapter 7 bankruptcy status was irrelevant to their ability to pay because their earlier decisions to pay creditors rather than their employees had already left insufficient funds in the bankruptcy trust to pay the employees.

> [E]ven if we agreed that *Ellerman* stands for the proposition that lack of control over payment of earned wages relieves either a bankrupt employer or its officers from liability under RCW 49.52.050 or RCW 49.52.070, that would not change our conclusion in this case. Funsters had only $85,000 in cash to pay wages exceeding $179,000 on the date of conversion to chapter 7. Payday was four days later. Control over the payment of wages was irrelevant, given the fact there was insufficient cash to pay the wages.

*Morgan*, 141 Wn. App. at 158.

The Amici's assertion that *Morgan* undermines protections for corporate officers is simply wrong on the facts and wrong on the law. The Amici mistakenly state that the Defendants' failure to pay did not occur prior to conversion because the pay day for the previous two weeks, on April 11, fell after the Chapter 7 conversion. Amici Memorandum at 9. But, as Plaintiffs stated in their briefing, and as the Court of Appeals acknowledged, wages are earned when worked, and at the time of Chapter 7 liquidation, the Defendants were fully in control of payment of

earned wages to the employees.[4] Brief of Respondents/Cross-Appellants at 16; *Morgan*, 141 Wn. App. at 151.

The Amici's other arguments similarly have no basis in law or are simply wrong on the facts. The Amici make the novel assertion that if the agent of the employer is liable for only 15% of the amount claimed, the Court cannot find "willfulness" or double damages as required by statute. Amici Memorandum at 9. The Amici cite no authority for this contention. The Amici further assert that the pay period ending March 28 "included paychecks issued but not cashed." Amici Memorandum at 9. There is no evidence of that in the record.

The Amici's policy argument that the Court of Appeals' decision will have a "chilling" effect on business in Washington is factually baseless. The Court of Appeals applied *Schilling* to a parallel set of facts and reached the same conclusion this Court did ten years ago. The Amici offer no evidence that *Schilling* has had any effect on business in

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[4] The Amici similarly confuse the legal issues by citing the recent decision in *Champagne v. Thurston County*, 2008 Wn. LEXIS 155 (February 14, 2008). Memorandum at 8. *Champagne* found no willfulness because the employees were subject to a collective bargaining agreement whereby they agreed to a delayed pay schedule. *Champagne,* 2008 Wn. LEXIS 155 at *3. Thus, there was a "bona fide dispute" (one of two recognized exceptions to willfulness that was never argued by the Defendants below and does not apply). *See, id.* at *20. Moreover, the Court in *Champagne* noted that the employees may have had a claim under the wage reduction act, RCW 49.52, for late payment. *Id.* at *21. *Champagne*, in fact, relies on *Schilling* and makes no change to the meaning of "willful" under the statutes. *See, id.* at n.1.

Washington. Both the Amici and Defendants ignore the fact that the statutes at issue were enacted well over sixty years ago, and *Schilling* and RCW 49.52.070 apply only to unpaid wages; the other protections of the corporate veil remain. *Morgan* does nothing to change these protections, under which Washington businesses have thrived for well over half a century.

The Amici's policy argument contradicts Washington's long-standing policy to ensure that hourly wage earners are paid by their employers:

> The Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages.

*Schilling*, 136 Wn.2d at 158. If the legislature wanted to provide a carte blanche "inability to pay" defense after *Schilling*, it could have done so. Instead, the legislature approved this Court's interpretation of RCW § § 49.52.050, 070 in *Schilling*. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986) (legislative inaction after judicial interpretation of a statute indicates legislative approval of the court's construction of the statute).

Contrary to the Amici's contention, there is no issue of substantial public interest this Court needs to determine. The Amici want "to protect risk-taking," just as Defendants want to "encourage productive business activity and make it possible for individual businesses to assume the risks necessary to compete in today's economy." *See* Amici Memorandum at 10; Petition at 19. That's fine, but Washington law is clear that employers cannot wager money that belongs to their employees when those employees have not agreed to assume that risk. The legislature, this Court in *Schilling*, and the Court of Appeals have already made explicit what the Amici fail to see: that once an employee earns his or her wage, it is no longer the company's to gamble with.

## III. CONCLUSION

Because the Amici cite no decision with which *Morgan* conflicts, and because Washington's policy to penalize employer's who refuse to pay their employees is plain, the Court should deny Defendants' and the Amici's petition for review.

RESPECTFULLY SUBMITTED this 18th day of April, 2008.

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## CERTIFICATE OF SERVICE

Cheryl Rody, under penalty of perjury under the laws of the State of Washington, hereby certifies that on this 18th day of April, 2008, I caused copies of the foregoing **Plaintiffs' Objection to Seven Statewide Business Groups' Motion for Leave to Submit Amici Curiae Memorandum** to be hand delivered via legal messenger to the following attorneys of record:

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